IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 59 of 1988
and
INCOME TAX REFERENCE No 60 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MOHANLAL S DOPPA

Versus

COMMISSIONER OF INCOME-TAX

Appearance:
MR KH KAJI for Petitioner
MR AKIL KURESHI WITH MR MANISH R BHATT for Respondent

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE D.A.MEHTA

Date of decision: 03/10/2001

COMMON ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

Both these references, at the instance of the

same assessee, are made by the Income-tax Appellate Tribunal, Ahmedabad under Section 256(1) of the Income-tax Act, 1961 (for brevity "the Act").

In Income-tax Reference No. 59 of 1988, the following question is referred for the opinion of this Court in respect of assessment years 1974-75 and 1975-76::-

"Whether on the facts and in the circumstances of the case, the levy of penalty u/s. 271(1)(a) was legal and valid in law ?"

In Income-tax Reference No. 60 of 1988, the following question is referred for the opinion of this Court in respect of assessment years 1976-77 and 1977-78:-

"Whether on the facts and in the circumstances of the case, the levy of penalty u/s. 273(c) was legal and valid in law ?"

2. The relevant facts as found by the Tribunal and incorporated in the statement of case are as under :-

The assessee is an individual having business income. The assessee had made an application before the Settlement Commission (for brevity "the Commission") under Section 245C of the Act. The Commission passed order dated 3.10.1980 under Section 245D of the Act, including the order in respect of certain penalties also. Para 8 of the Commission's order dealing with penalties read as under :-

"In view of the full disclosure made by the applicant and the complete co-operation extended by him, there is no case for levy of penalty u/s. 271(1)(c) nor is there any case for any prosecution. The applicant is, therefore, entitled to the grant of immunity on these counts.

The applicant did not file the returns of income for the A.Ys. 1976-77 and 77-78 before the I.T. Authorities. These returns have been filed only before the Commission and are, therefore, belated. The applicant has explained that he was working under a mistaken impression that these returns could be filed on the basis of the settlement reached without attracting any

penalty. On an over all consideration of the case and having regard to the complete co-operation extended by the applicant, we do not think that the applicant should be penalized for an inadvertent and mistaken default. No penalty will, therefore, be imposed u/s. 271(1)(a) for any of these years. The interest chargeable u/s. 139(8) is also waived."

2.2 Thereafter, the Income-tax Officer passed an order giving effect to the Commission's order. In the said order, the Income-tax Officer also directed initiation of penalty proceedings. Accordingly, a show cause notice was issued and by his order dated 31.3.1983, the Income-tax Officer imposed penalties under Section 271(1)(a) for late filing of return - penalty of Rs.17,000/- for assessment year 1974-75 and penalty of Rs.15,100/- for assessment year 1975-76. Similarly, on the same date, the Income-tax Officer passed orders imposing penalties under Section 273(c) of the Act (for failure to file the estimate of advance tax) - penalty of Rs.4,370/- for assessment year 1976-77 and penalty of Rs.3,640/- for assessment year 1977-78.

2.3 The assessee filed appeals against the said orders dated 31.3.1983 before the Commissioner of Income-tax (Appeals).

2.4 Meanwhile, the assessee had filed a Misc. Application before the Settlement Commission pointing out that the Commission had not dealt with the following issues, while passing the order, though specific request was made by the assessee :-

(i) A.Y. 1974-75
(a) Interest chargeable u/s. 139(8)
(b) Penalty u/s.271(1)(a)

(ii) A.Y. 1975-76
(a) Interest chargeable u/s. 139(8)
(b) Penalty u/s.271(1)(a)

(iii) A.Y. 1976-77
(a) Interest u/s. 217(1-A)
(b) Penalty u/s.273(c)

(iv) A.Y. 1977-78
(a) Interest u/s. 217(1-A)
(b) Penalty u/s.273(c)

The Commission, however, passed order dated

31.1.1984 rejecting the assessee's application with an observation that there was no need for modification of the Commission's order dated 3.10.1980 passed under Section 245D of the Act.

The assessee filed a writ petition before the Delhi High Court for challenging the aforesaid order dated 31.1.1984 of the Settlement Commission. The Delhi High Court dismissed the writ petition as premature on the ground that the appeals were pending with the Commissioner of Income-tax (Appeals).

2.5 Ultimately, the Commissioner of Income-tax dismissed the appeals of the assessee. The assessee carried the matter in appeals before the Income-tax Appellate Tribunal. The Tribunal dismissed the appeals. Hence, these references at the instance of the assessee.

3. We have heard Mr KH Kaji, learned counsel for the assessee and Mr Akil Kureshi, learned counsel for the revenue.

4. Mr Kaji, learned counsel for the assessee has submitted as under :-

4.1 The Tribunal erred in not appreciating the scheme of the provisions of Chapter XIX-A regarding Settlement of Cases. Once the Commission entertained the assessee's application under Section 245C of the Act, it was for the Commission to deal with all the issues pertaining to tax, penalty or interest relating to the assessment year in question and it was then not open to the Assessing Officer to invoke any provision for penalty whether under Section 271(1)(a), Section 273(c) or Section 217(1-A) of the Act.

4.2 Even if the Commission's order under Section 245D(4) did not make any reference to certain penalties for the concerned years as set out in para 2.4 hereinabove, the Commission must be deemed to have dealt with all the questions pertaining to penalty in respect of the cases at hand and the Assessing Officer cannot thereafter impose any penalty under the Act, with respect to the cases covered by the settlement as contemplated by Section 245H(1) of the Act.

4.3 In the alternative, it is submitted that para 8 of the Commission's order refers to the complete co-operation extended by the assessee and full disclosure made by the assessee. Hence, the reasoning which appealed to the Commission for waiver of penalty under

Section 271(1)(a) and for waiver of interest under Section 139(8) was applicable to all the penalties for all the four assessment years under consideration and, therefore also, the Assessing Officer was not justified in levying penalty under Section 271(1)(a) or 273(c) of the Act for assessment years 1976-77 and 1977-78. On the same ground, the Assessing Officer was not justified in levying penalty under Section 271(1)(a) and in charging interest under Section 139(8) for assessment years 1974-75 and 1975-76.

5. On the other hand, Mr Akil Kureshi, learned counsel for the revenue has submitted as under :-

5.1 After the Settlement Commission passed the order under Section 245D(4) of the Act, the Assessing Officer was not divested of the powers available to him under various provisions of the Act for imposing penalty and for charging interest because under Sec. 245-I, the order of the Commission attains finality only as to matters stated in the order under Section 245D(4).

5.2 Section 245H(1) also supports the revenue's case that the Settlement Commission is required to pass a specific order for granting immunity from imposing penalty under the Act. If the absence of any direction for a penalty in the order of the Commission were to amount to automatic waiver of penalty, there was no need for conferring specific power on the Commission under Section 245H to grant express immunity from imposition of any penalty under the Act, with respect to the cases covered by the settlement.

5.3 Dealing with the alternative contention of Mr Kaji, it is submitted that the very fact that the Settlement Commission dismissed the assessee's miscellaneous application by order dated 31.1.1984 clearly shows that the Commission did not intend to grant any immunity to the assessee from imposition of penalty and levy of interest under the relevant provisions of the Act as pointed out in para 2.4 hereinabove.

6. Before dealing with the rival submissions, it is necessary to make a reference to the relevant statutory provisions contained in Chapter XIX-A of the Act as inserted by Taxation Laws (Amendment) Act, 1975 with effect from 1.4.1976.

Chapter XIX-A bears the title "SETTLEMENT OF CASES". Section 245A(a) defines "case" as any proceeding ... ... under this Act for or in connection with the

assessment or reassessment of any person in respect of any year or years which may be pending before an income-tax authority on the date on which an application under Section 245C(1) is made. Section 245B empowers the Central Government to constitute the Income-tax Settlement Commission for the settlement of cases. The Commission is to consist of a Chairman and two other members who are to be appointed from amongst persons of integrity and outstanding ability, having special knowledge of, and experience in, problems relating to direct taxes and business accounts.

Sub-section (1) of Section 245C at the relevant time read as under :-

"(1) An assessee may, at any stage of a case relating to him, make an application in such form and in such manner and containing such particulars as may be prescribed to the Settlement Commission to have the case settled and any such application shall be disposed of in the manner hereinafter provided."

(emphasis supplied)

Sub-section (2) provided for fees to be prescribed. Sub-section (3) provided that an application for settlement of cases shall not be allowed to be withdrawn by the applicant.

Section 245D laid down the procedure. Sub-section (1) provided that on receipt of an application for settlement of a case, the Settlement Commission shall call for a report from the Income-tax Commissioner and on the basis of the materials contained in such report and having regard to the nature and circumstances of the case or the complexity of the investigation involved therein, the Commission may allow the application to be proceeded with or reject the application. Such an application cannot be rejected without offering an opportunity of hearing to the applicant. The second proviso is not relevant for the purpose of the present discussion, but it gave authority to the Income-tax Commissioner to object to the consideration of the application on the ground of concealment of particulars of income or perpetration of fraud by the assessee for evading any tax. Sub-section (3) provided that once the Commission decides to proceed with the application, it may call for the relevant records from the Income-tax Commissioner and after

examination of such records, if the Commission is of the opinion that any further enquiry or investigation is necessary, it may direct the Income-tax Commissioner to make or cause to be made such further enquiry and furnish "a report on the matters covered by the application and any other matter relating to the case." Sub-sections (4) and (6) of Section 245D are set out verbatim :-

"(4) After examination of the records and the report of the Commissioner, received under sub-section (1), and the report, if any, of the Commissioner received under sub-section (3), and after giving an opportunity to the applicant and to the Commissioner to be heard, either in person or through a representative duly authorized in this behalf, and after examining such further evidence as may be placed before it or obtained by it, the Settlement Commission may, in accordance with the provisions of this Act, pass such order as it thinks fit on the matters covered by the application and any other matter relating to the case not covered by the application, but referred to in the report of the Commissioner under sub-section (1) or sub-section (3).

(6) Every order passed under sub-section (4) shall provide for the terms of settlement including any demand by way of tax, penalty or interest, the manner in which any sum due under the settlement shall be paid and all other matters to make the settlement effective and shall also provide that the settlement shall be void if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts."

(emphasis supplied)

Section 245E of the Act even empowered the Commission to reopen, with the concurrence of the applicant, the completed proceedings subject to the limitation of 8 years.

Sub-sections (1) and (2) of Section 245F of the Act specifically provided that the Settlement Commission "shall have all the powers which are vested in an income-tax authority under this Act" and that when the application for settlement of case is allowed to be proceeded with, the Commission shall have "exclusive

jurisdiction to exercise the powers and perform the functions of an income-tax authority under this Act in relation to the case" until an order is passed under Section 245D(4). Sub-section (3) of Section 245F provided that in the absence of any express direction to the contrary by the Settlement Commission, nothing contained in Section 245F shall affect the operation of any other provision of the Act requiring the applicant to pay tax on the basis of self-assessment or by way of advance tax in relation to the matters before the Settlement Commission.

Sub-section (1) Section 245H read as under :-

"(1) The Settlement Commission may, if it is satisfied that any person who made the application for settlement under section 245C has co-operated with the Settlement Commission in the proceedings before it and has made a full and true disclosure of his income and the manner in which such income has been derived, grant to such person, subject to such conditions as it may think fit to impose, immunity from prosecution for any offence under this Act or under the Indian Penal Code (45 of 1860) or under any other Central Act for the time being in force and also from the imposition of any penalty under this Act, with respect to the case covered by the settlement."

Section 245-I reads as under :-

"Every order of settlement passed under sub-section (4) of section 245D shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in this Chapter, be re-opened in any proceeding under this Act or under any other law for the time being in force."

6A. It appears that the provisions of Chapter XIX-A regarding Settlement of Cases were substantially amended by Amendment Acts of 1984 and 1987, but those amendments are not relevant as the assessment years under consideration are from 1974-75 to 1977-78 and the order of the Settlement Commission under Section 245D(4) in the instant case was passed on 3.10.1980. Moreover, the amendments do not alter the basic scheme of Chapter XIX-A of the Act, in so far as the provisions having a direct

bearing on the controversy involved in the instant case are concerned.

7. A bare perusal of the aforesaid provisions of the Act indicates that the scheme is for settlement of cases. The common thread running through these provisions is that at any stage of a case relating to it, the assessee can make an application to have the case settled. After hearing the department, the Settlement Commission can decide whether to proceed with the application or not. Once it decides to proceed with the application, the Commission may call for the relevant records from the Income-tax Commissioner and direct any further enquiry or investigation and call for the Commissioner's report on the matters covered by the application and any other matter relating to the case. After receiving the report, the Settlement Commission is to give an opportunity of hearing to the assessee as well as to the department and thereafter the Commission is to pass an order which "shall provide for the terms of the settlement including any demand for tax, penalty and interest and the manner in which any sum due under the settlement shall be paid and all other matters to make the settlement effective". The Commission is also to have the exclusive jurisdiction to exercise the powers and perform the functions of an income-tax authority under the Act in relation to the case. The Commission has been granted power to grant immunity from prosecution under the Income-tax Act or the Indian Penal Code or any other Central Act and also from the imposition of any penalty under the Act with respect to the case covered by the settlement.

8. Hence, the scheme of the Chapter is that once the application is entertained by the Settlement Commission, it is the Settlement Commission alone which has to decide all matters pertaining to that "case" which is defined as any proceeding under the Income-tax Act for or in connection with the assessment or reassessment of any person in respect of any year or years which is pending before the income-tax authority on the date on which the application is made under Section 245C of the Act. Of course, the Department gets ample opportunity to put up its case before the Commission at as many as three stages including two stages after admission of the application under Section 245D(1) that is, the stage of submitting a report by the Income-tax Commissioner under Section 245D(3) and hearing before the Settlement Commission under Section 245D(4). At both the stages the Department can request the Settlement Commission to give directions for levy of interest and imposition of penalty while passing orders under Section 254D(4). In view of the all

pervasive language of various sections in the Chapter which is a self contained code, we find considerable substance in the submission of Mr Kaji for the assessee that once the Settlement Commission is seized of the case, it is for the Settlement Commission alone to provide for all matters pertaining not only to tax leviable under the Act, but also to levy of interest and penalty and if, in its discretion, the Settlement Commission does not impose any penalty or does not give any direction for imposition of penalty, the Settlement Commission has to be treated as having exempted the assessee from the imposition of penalty which the Assessing Officer could have otherwise imposed if the case had not gone before the Settlement Commission. Looking to the constitution of the Settlement Commission as set out in Section 245B of the Act, it is obvious that once the Settlement Commission decides the application for settlement including any direction (or absence thereof) for any penalty or interest, it is not for the Assessing Officer to invoke his powers under other provisions of the Act empowering him to levy penalty such as under Section 271(1)(a) or Section 273 or under Section 139(8) of the Act for levying interest, because all such powers were very much available to the Commission under Section 245F of the Act and if, in its discretion, the Settlement Commission did not choose to invoke those powers, the Assessing Officer cannot subsequently invoke them after the Settlement Commission has passed an order under Section 245D(4) of the Act.

9. The submission of Mr Kureshi for the revenue, however, is that the exclusive jurisdiction of the Settlement Commission is provided only till passing of the order under sub-section (4) of Section 245D and that thereafter, there is nothing to prevent the Assessing Officer from invoking his powers for levying penalty.

We are afraid the contention runs counter to the aforesaid scheme permeating the provisions of the Chapter which has been enacted for the specific purpose of settlement of cases i.e. for encouraging the assessees to come forward with true and full disclosure of income and giving utmost cooperation and sparing the department from the hassles of contentious litigations including appeals, revisions and references. In other words, the scheme is for settlement of the "case" (as defined by Section 245(a)) once and for all Once the case is ordered to be settled by the Commission under sub-sections (4) and (6) of Section 245D of the Act, none of the issues required to be covered under sub-sections (4) and (6) can be reopened unless it is subsequently found by the

Settlement Commission that the settlement was obtained by fraud or misrepresentation of fact. Even in case such an exception is applicable, under Section 245D(6) it is for the Settlement Commission to consider whether the Settlement was obtained by fraud or misrepresentation of fact). Admittedly, in the facts of the instant case, no such exception was ever invoked nor was the Settlement Commission's order under Section 245D(4) ever challenged by the revenue.

10. The only limited question is, once the Settlement Commission's order under Section 245D(4) did not provide for imposition of any penalty under Section 271(1)(a) of the Act or under Section 273(c) of the Act or under any other provisions of the Act, whether the Assessing Officer could have initiated the proceedings or levied the penalty under the aforesaid provisions even after the case was settled under Section 245D of the Act.

11. We will now consider Mr Kureshi's submission that Section 245H(1) requires an order for exemption from imposition of penalty and, therefore, in absence of such an express order, mere absence of penalty in the order under Section 245D(4) cannot be treated as automatic exemption.

Though prima facie attractive, the submission cannot be accepted on closer scrutiny.

While Section 245F confers all powers of the income-tax authority under the Act on the Settlement Commission and also confers exclusive jurisdiction under the Act on the Settlement Commission and Section 245D(6) requires and enjoins upon the Commission to provide for all matters to make the settlement effective including any demand for tax, penalty or interest and the manner for payment of all dues under the settlement, in absence of Section 245H(1), the Settlement Commission could not have passed any order from exemption from prosecution or exemption from imposition of any penalty in a case where the income-tax authority was not vested with the discretion not to impose penalty. While conferring this power under Section 245H(1) on the Settlement Commission, (consisting of persons of integrity and outstanding ability and having special knowledge of, and experience in, problems relating to direct taxes and business accounts - Section 245B), Section 245F(3) specifically provides that in the absence of any express direction to the contrary by the Commission, nothing in Section 245F shall affect the liability of the applicant to pay tax in relation to the matters pending before the Commission. A

conjoint reading of Sections 245A(a), 245B, 245D(4), 245D(6), 245F(3) and 245H(1) of the Act, therefore, leads us to the conclusion that exemption from imposition of penalty by the Settlement Commission need not be express, and that absence of any direction for penalty in the order for settlement under Section 245D (4) results into or is to be treated as exemption from imposition of penalty, under the Income-tax Act, but an express direction of the Settlement Commission would be required if the assessee claims any benefit in the matter of levy or quantification of tax as contrasted with that of penalty.

12. Since the provisions of the Income-tax Act themselves contain provisions conferring discretion on the Commissioner of Income-tax to waive penalty leviable under the Act, which power also enures to the Settlement Commission under Section 245F of the Act, Section 245H(1) did not have to provide for any specific power on the Settlement Commission for waiver of interest. Though the question about effect of omission of any direction for levying interest in the Commission's order under Section 245D(4) is not referred to us, this facet of interpretation of Section 245H(1) is highlighted to show that it lends support to our analysis of the scheme for settlement of cases contained in Chapter XIX-A of the Act that once the Settlement Commission decides to entertain under Section 245D(1) of the Act an application under Section 245C for settlement of a case, it is for the Settlement Commission alone to pass any orders for tax, penalty and interest and that once any order is passed under section 245D(4) of the Act, the Assessing Officer or any other authority cannot go beyond or behind that order, at least in the matters of penalty leviable under the Income Tax Act.

13. In light of the above analysis of the provisions of Chapter XIX-A for settlement of cases, we are of the view that if the Settlement Commission's order under sub-section (4) of Section 245D of the Act did not contain any direction for levy of penalty, any such omission would amount to immunity under Section 245H(1) from the imposition of penalty under the Act with respect to the case covered by the settlement. In this view of the matter, it is not open to the Assessing Officer to initiate any proceedings for imposition of penalty, even if any specific order for exemption from imposition of penalty is not contained in the order of the Settlement Commission under Section 245D(4) of the Act.

14. In view of the above finding, it is not necessary

for us to consider the alternative submission made by Mr Kaji regarding absence of justification for the authority to levy penalty in the facts of the instant case.

15. In view of the above discussion, we are of the opinion that the Assessing Officer had no power to levy penalty under Sections 271(1)(a) and 273(c) of the Act in absence of any specific direction of the Settlement Commission in the order dated 3.10.1980 settling the case under Section 245D(4) of the Act. Accordingly, our answer to the questions referred to us is in the negative i.e. in favour of the assessee and against the revenue.

16. The references accordingly stand disposed of with no order as to costs.

(M.S. Shah, J.)

(D.A. Mehta, J.)

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